

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

DEC -2 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0210-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
WAYNE CHIN,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054730

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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H O W A R D, Chief Judge.

¶1 Wayne Chin petitions this court for review of the trial court's denial of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will

not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Chin was convicted after a jury trial of conspiracy to commit possession or transportation of marijuana for sale. The trial court sentenced him to a 3.5-year prison term, and we affirmed Chin’s conviction and sentence on appeal, modifying the conviction and sentence imposed “to reflect a conviction of a class three felony.” *State v. Chin*, No. 2 CA-CR 2007-0398, ¶¶ 1, 10 (memorandum decision filed Sep. 4, 2009). Chin then filed a notice and petition seeking post-conviction relief, asserting the reasonable doubt instruction given to the jury pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), constituted structural error that could not be precluded pursuant to Rule 32.2. He also asserted a “sentencing error may have occurred” because he “may have improperly served a 4 year sentence . . . rather than [the] 3.5 year sentence imposed.” The trial court summarily dismissed Chin’s petition, concluding that his claim based on *Portillo* was precluded and meritless and that Chin had “served no more time than to which he was sentenced.”

¶3 On review, Chin asserts his *Portillo* claim is not precluded due to his failure to raise the claim on appeal because a defective reasonable doubt instruction violates his due process right and constitutes structural error requiring reversal. *See State v. Ring*, 204 Ariz. 534, ¶¶ 45-46, 65 P.3d 915, 933 (2003) (recognizing defective reasonable doubt instruction structural error; structural error requires automatic reversal); *see also* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from relief on ground “[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding”). Thus, he reasons,

the claim is of sufficient constitutional magnitude to require his knowing, voluntary, and intelligent waiver, and his counsel's waiver by failing to raise the issue on appeal does not preclude him from seeking relief pursuant to Rule 32. *See Stewart v. Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d 1067, 1071 (2002) (claim of "sufficient constitutional magnitude" not precluded under Rule 32.2(a)(3) if "there has been no personal waiver" by defendant).

¶4 But Chin is mistaken that, because his claim implicates due process, it is of sufficient constitutional magnitude to require his personal waiver and cannot be regarded as waived for the purposes of Rule 32.2(a)(3) by his failure to have raised it in previous proceedings. *See Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d at 954 ("mere assertion by a defendant that his or her right to a fair trial has been violated is not a claim of sufficient constitutional magnitude" to avoid finding of waiver "for purposes of Rule 32.2"). Chin cites no authority, and we find none, suggesting a claim based on a purportedly faulty reasonable doubt jury instruction, even if it might constitute structural error, involves a right that must be waived personally.

¶5 In any event, in addition to the claim being precluded, it also lacks merit. Our supreme court has rejected challenges to the instruction mandated by *Portillo* and repeatedly has expressed its preference for that instruction. *See, e.g., State v. Dann*, 220 Ariz. 351, ¶ 65, 207 P.3d 604, 618 (2009); *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *see also City of Phx. v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) (court of appeals "bound by decisions of the Arizona Supreme Court and ha[s] no authority to overrule, modify, or disregard them").

¶6

For the reasons stated, although we grant review, we deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge